

Order 96-7-33



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 5th day of July, 1996

SERVED: July 30, 1996

U.S.-LIMA COMBINATION SERVICE PROCEEDING
(Miami-Lima portion)

Docket OST-95-370

**ORDER ISSUING CERTIFICATE AND
ALLOCATING FREQUENCIES**

Summary

By this order, we award new certificate authority to United Air Lines, Inc., to provide scheduled foreign air transportation of persons, property, and mail between Miami, Florida, and Lima, Peru. The order also allocates to United 7 weekly frequencies and to American Airlines 1 additional frequency for service in the Miami-Lima market.

Background

By Order 95-7-23, the Department instituted the *U.S.-Lima Combination Service Proceeding* to, among other things, select a primary and backup carrier to provide scheduled combination service in the Miami/Ft. Lauderdale-Lima market and to allocate 8 available weekly frequencies for that service.¹ In addition, the order allocated, *on apendente lite*

¹ Under the 1986 Air Transport Agreement between the United States and Peru, as amended, there are no limits on the number of U.S. carriers that may provide scheduled combination air services between the two countries. However, the total number of weekly frequencies that U.S. carriers may operate in the market is limited to 31.5 effective through October 31, 1996. Of these 31.5 frequencies, only 24.5 are available for services from Miami/Ft. Lauderdale. American and United have been allocated the 24.5 weekly flights for Miami service. Continental has been allocated the 7 weekly frequencies available for services to points other than Miami. Order 95-12-26. (In November 1996, 10.5 additional weekly U.S.-Peru frequencies will become available. Requests for

basis, 1 weekly frequency to American and 2.5 weekly frequencies to United. United had earlier been granted a temporary allocation of the other 4.5 weekly frequencies at issue in this proceeding. See Orders 95-4-21 and 95-7-23².

Three carriers--American, Carnival, and United--filed applications for long-term awards in this proceeding. American initially sought allocation of 3.5 of the eight frequencies, stating that it would use those frequencies, along with the 16.5 frequencies it already held, to operate 20 weekly roundtrip flights between Miami and Lima with 188-seat B757 aircraft³. However, American further stated that if the Department determined to grant a portion of the frequencies to United or Carnival, American alternatively requested the allocation of one additional frequency to be used to formalize the operation of its current B757 service on a daily basis.

United filed an application for certificate authority to serve the Miami-Lima market, seeking allocation of 7 weekly frequencies.⁴

Carnival filed an application for certificate authority to serve the Miami-Lima market, along with a request for allocation of 3 weekly frequencies.

Subsequent Developments

Prior to the date on which direct exhibits were to be filed, Carnival withdrew its request for a primary award in this proceeding.⁵ In response to Carnival's notification, American filed a motion stating that it was prepared to accept an allocation of 1 weekly frequency and,

allocation of these frequencies are being considered in the *U.S.-Lima Combination Service Proceeding (1996)*, Docket OST-96-1037; and the *U.S.-Lima Combination Service Proceeding (1996) Phase Two*, Docket OST-96-1104.)

² Taking into consideration earlier Departmental allocations for Miami-Lima services, including the described *pendente lite* awards, American holds a total of 17.5 weekly frequencies (16.5 on a long-term basis and 1 on a *pendente lite* basis) and United, a total of 7 weekly frequencies in the market, all on a *pendente lite* basis until a final decision in this proceeding. On April 18, 1996, the Department granted orally (1) the application of American, in Docket OST-96-1073, for renewal of its allocation for 1 weekly frequency for Miami-Lima services; and (2) the application of United, in Docket OST-96-1058, for renewal of its exemption authority to serve the Miami-Lima market, and allocation of 7 weekly frequencies to provide the service, pending a final decision in this proceeding. We confirm those actions here.

³ American already holds the requisite underlying authority to serve the market. Route 389. Order 90-5-5. American has filed a timely application for renewal of that certificate, and therefore, its authority remains in effect pursuant to the provisions of 5 U.S.C. 558(c) of the Administrative Procedure Act as implemented by Part 377 of the Department's regulations pending final action on American's renewal application. Thus, the carrier's application sought only a frequency allocation in this matter.

⁴ United also requested authority to integrate service on this route with United's other existing route authorizations consistent with outstanding international agreements.

⁵ Carnival stated that it wanted the Department to consider its application now as one for backup authority and that, in this regard, it also requested all eight Miami/Ft. Lauderdale-Lima frequencies on a backup basis.

therefore, that the remaining applications in this case were no longer mutually exclusive and the Department could proceed to a final decision.

By Notice dated August 22, 1996, the Department recognized the changed circumstances in this case, suspended all further procedural dates, and stated that it would proceed to make final awards to American and United for their Miami-Lima services. No party opposed that decision.⁶

Decision

Based on the above, we have decided to award a new certificate of public convenience and necessity to United Air Lines, to provide scheduled foreign air transportation of persons, property, and mail between Miami, Florida, and Lima, Peru. We will also allocate the 8 available Miami-Lima frequencies as follows: 7 weekly frequencies to United, and 1 weekly frequency to American. We will dismiss, without prejudice, the application of Carnival Air Lines, for Miami-Lima certificate authority and for a corresponding frequency allocation.

We find that approval of the certificate application filed by United to provide Miami-Lima services is consistent with the public convenience and necessity⁷. We also find that it is in the public interest to grant the requests of United and American for certain frequency allocations to provide Miami-Lima services. All of the proposed services will contribute to the variety of price and service options available to travelers and shippers in the Miami-Lima market. Moreover, all of the authority requested is consistent with the provisions of the U.S.-Peru aviation agreement.

We find that United is fit to provide the authorized services. United has previously been found to be a citizen of the United States and fit to provide scheduled foreign air transportation.⁸

⁶ Responsive pleadings in this case related to comparative selection issues. Because comparative selection is no longer necessary, the issues raised are moot and, therefore, do not need to be addressed.

⁷ We will also grant United's request for integration of this authority with United's other authority held by certificate and exemption. See Condition (10) of the attached certificate. In this regard, we note that by Order 96-2-15, United was granted authority to combine its Miami-Peru services (operated at that time under exemption) with its certificate authority to serve Chile on Route 632. This permitted United to operate services on a Miami-Lima-Santiago routing. Order 96-2-15 also allocated United three weekly fifth freedom frequencies for services between Lima and Santiago. That authority was granted for a period of one year. Nothing in our award here undermines that authorization. The certificate we are awarding here with its route integration provision, replaces the route integration authority previously awarded United by exemption. United, of course, will need to seek renewal of the frequency allocation at the appropriate time.

⁸ See, e.g., Order 96-5-9. In addition, we find that grant of these applications will not constitute a "major regulatory action" under the Energy, Policy and Conservation Act of 1975, since grant of each application would not result in a near-term increase in annual fuel consumption in excess of 10 million gallons.

We have decided to dismiss Carnival's application, without prejudice. Although Carnival amended its application to request backup authority only, including allocation of the eight frequencies available for Miami-Lima service, we find, given the circumstances of this case, no persuasive reason for granting its request. Furthermore, as discussed below, we have imposed our standard 90-day dormancy condition to the frequency allocations awarded which will afford the Department sufficient flexibility to secure replacement service quickly should either carrier cease its operations.

Terms, Conditions and Limitations

We will issue to United a new five-year experimental certificate for Miami-Lima service⁹. The certificate will be subject to the standard terms, conditions, and limitations applicable to U.S. carrier certificates.

We emphasize that the frequencies awarded here may not be held indefinitely if they are not being used. The opportunities here are limited and very valuable. It is not our intent that they be wasted. Therefore, we will impose our standard 90-day dormancy condition to the awards of both American and United in this proceeding. Thus, if the frequencies allocated are not used for 90 days, the frequency allocations will expire automatically and the frequencies will revert to the Department for allocation so that they will be available for other carriers on an immediate basis should they seek to use them. For these same reasons we also find that it is in the public interest to subject American's existing allocation of 16.5 weekly frequencies to the same dormancy condition, thereby ensuring that all frequencies allocated for U.S.-Peru services will not be wasted.¹⁰

ACCORDINGLY,

1. We issue to United Air Lines, Inc., in the form attached, a new temporary, experimental certificate of public convenience and necessity to provide scheduled foreign air transportation of persons, property, and mail between Miami, Florida, and Lima, Peru;
2. The certificate will be effective 30 days after the service date of this order, subject to the extension of the effective dates in accordance with the provisions of the certificate;
3. We allocate to United Air Lines, Inc., seven weekly frequencies to provide scheduled foreign air transportation of persons, property, and mail in the Miami-Lima market;
4. We allocate to American Airlines, Inc., one weekly frequency to provide scheduled foreign air transportation of persons, property, and mail in the Miami-Lima market;
5. The frequencies allocated in ordering paragraphs 3 and 4, above, will be effective immediately and will expire (a) one year from the date of service of this order, or (b) the

⁹ For those services operated under current exemptions, those exemptions will expire in accordance with their own terms 90 days after issuance of this order.

¹⁰ We note that the frequencies allocated to Continental for its U.S.-Lima services have similarly been made subject to this type of dormancy condition. See, *e.g.*, Order 96-12-26.

90th day that the holder fails to use the frequencies, whichever occurs earlier; unless the Department earlier suspends, modifies, or withdraws the frequency allocation;

6. The 16.5 weekly frequencies currently held by American Airlines, Inc., for services in the U.S.-Peru market shall be subject to a 90-day dormancy condition such that if American fails to use those frequencies for a period of 90 days they will revert back to the Department for reallocation;

7. We dismiss, without prejudice, the application of Carnival Air Lines, Inc., in the *U.S.-Lima Combination Service Proceeding (Miami-Lima Portion)*, Docket OST-95-370;

8. We confirm our oral action of April 18, 1996, granting the application of American Airlines, Inc., in Docket OST-96-1073, for renewal of its temporary allocation of one weekly frequency for Miami-Lima service;

9. We confirm our oral action of April 18, 1996, granting the application of United Air Lines, Inc., in Docket OST-96-1058, for renewal of its exemption authority to provide scheduled foreign air transportation of persons, property, and mail in the Miami-Lima market, and renewal of its temporary allocation of seven weekly frequencies to provide the service;

10. To the extent requested, we grant all motions for leave to file otherwise unauthorized documents in each of the captioned dockets;

11. To the extent not granted or dismissed, we deny all motions and requests in these dockets;

12. Unless disapproved by the President of the United States under 49 U.S.C. 41307, this order shall become effective upon the 61st day after its submission for section 41307 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier;¹¹ and

¹¹ This order was submitted for section 41307 review on July 5, 1996. On July 24, 1996, we received notification that the President's designee under Executive Order 12597 and implementing regulations did not intend to disapprove the Department's order.

13. We will serve this order on the parties to the captioned dockets of this order, the Ambassador of Peru in Washington, D.C., the U.S. Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration (AFS-200).

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at
<http://www.dot.gov/dotinfo/general/orders/aviation.html>*



Experimental Certificate of Public Convenience and Necessity

Route 703

This Certifies That

UNITED AIR LINES, INC.

is authorized, subject to the provisions of Subtitle VII of Title 49 of United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

Issued by Order 96-7-33
On July 5, 1996
Effective on August 22, 1996

Charles A. Hunnicutt
Assistant Secretary for Aviation
and International Affairs

Terms, Conditions and Limitations

United Air Lines, Inc., for Route 703

is authorized to engage in foreign air transportation of persons, property and mail:

Between the terminal point Miami, Florida, and the terminal point Lima, Peru.

This authority is subject to the following provisions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them.
- (3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.
- (4) The holder's authority is effective only to the extent that such operations are also authorized by the Federal Aviation Administration (FAA).
- (5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).
- (6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the Federal Aviation Act or the Department's regulations shall be sufficient grounds to revoke this certificate.

(7) Should the holder propose any substantial change in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.

(8) In the event that the holder commences operations for which it was found “fit, willing, and able” and subsequently ceases all such operations, its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may not recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

(9) The holder acknowledges that this certificate is granted to determine if the holder’s projected services, efficiencies, methods, rates, fares, charges, and other projected results will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative and low-priced air transportation it proposed in its application for this authority.

(10) The holder may combine services on this certificate with all services authorized by other Department of Transportation certificates or exemptions provided, that such operations are consistent with applicable international agreements; and provided further, that (a) nothing in the award of the route integration authority requested should be construed as conferring upon United additional rights (including fifth freedom intermediate and /or beyond rights) to serve markets where U.S. carrier entry is limited unless United first notifies the Department of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use limited entry route rights that are included in United’s authority by virtue of the route integration authority granted here, but not being used, the holding of such authority by route integration will not be considered as providing any preference for United in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

(11) Exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions, and limitations that the Department of Transportation may prescribe in the public interest.

This certificate shall become effective August 22, 1996; provided, however, that prior to the date on which the certificate would otherwise become effective, the Department, either on its own initiative or upon a timely filing of a petition for reconsideration of the order issuing this certificate, may by order or orders extend such effective date from time to time. It shall expire five years thereafter, unless the Department earlier suspends, modifies, or deletes the authority.